

**BEFORE THE
RESPIRATORY CARE BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Accusation and Petition to
Revoke Probation Against:

DAMIEN MARK HERRERA
541 N. Osborn
West Covina, CA 91790

Case No.: R-2057

OAH No.: L2007050034

DECISION AND ORDER

On July 13, 2007, in Los Angeles, California, Julie Cabos-Owen, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

Richard D. Marino, Deputy Attorney General, California Department of Justice, appeared on behalf of complainant Respiratory Care Board of California, (hereafter "Board").

Respondent Damien Mark Herrera was present and represented by Edgardo Gonzalez, Attorney at Law.

The matter was submitted on July 13, 2007.

The Board received the Proposed Decision from Judge Cabos-Owen, dated July 26, 2007, on or about July 30, 2007.

The Board then considered the adoption of the proposed decision. Now, therefore, pursuant to the provisions of California Government Code Section 11517(c) (2) and (C),

IT IS SO ORDERED:

That the following technical errors in the proposed decision are corrected, as follows:

1. On page 1, paragraph 1, the date Complainant Stephanie Nunez filed the Accusation and Petition to Revoke Probation was not "February 1, 2007" but "February 21, 2007"; and

2. On page 1, paragraph 2, the date the Board issued Respiratory Care Practitioner License Number 20799 to Respondent was not "August 9, 1985" but "May 13, 1999".

The attached proposed decision is changed to reflect the correct dates as indicated above and is hereby adopted by the Respiratory Care Board of California, Department of Consumer Affairs, as its Decision in the above entitled matter.

This Decision shall become effective on September 3, 2007.

It is so ORDERED August 27, 2007.

Original signed by:

LARRY L. RENNER, BS, RRT, RCP, RPFT
PRESIDENT, RESPIRATORY CARE BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

**BEFORE THE
RESPIRATORY CARE BOARD
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**In the Matter of the Accusation and Petition to
Revoke Probation Against:**

DAMIEN MARK HERRERA

Respiratory Care Practitioner License No. 20799

Respondent.

Case No. R-2057

OAH No. L2007050034

PROPOSED DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on July 13, 2007, in Los Angeles, California. Complainant was represented by Richard D. Marino, Deputy Attorney General. Damien Mark Herrera (Respondent) was present and was represented by Edgardo Gonzalez, Attorney at Law.

Oral and documentary evidence was received and argument was heard. The record was closed and the matter was submitted for decision on July 13, 2007.

FACTUAL FINDINGS

1. On February 1, 2007, Complainant Stephanie Nunez filed the Accusation and Petition to Revoke Probation while acting in her official capacity as Executive Officer of the Respiratory Care Board of California (Board), Department of Consumer Affairs.

2. On August 9, 1985, the Board issued Respiratory Care Practitioner License Number 20799 to Respondent. The license is in full force and effect and will expire on April 30, 2009, unless renewed.

3. At the administrative hearing, Respondent stipulated to all of the charges in the Accusation and Petition to Revoke Probation, set forth verbatim below and incorporated by reference as Factual Findings herein.

3. In a disciplinary action entitled *In the Matter of the Accusation Against Damien Herrera*, Case No. R-1380, the Board issued a decision, effective November 17, 2000, in which Respondent's license was revoked.

However, the revocation was stayed and Respondent's license was placed on probation for three (3) years with certain terms and conditions. [...] In a disciplinary action entitled *In the Matter of the Accusation Against Damien Mark Herrera*, Case No. R-1960, the Board issued a decision, effective July 18, 2005, in which Respondent's license was revoked. However, the revocation was stayed and Respondent's license was placed on probation for three (3) years with certain terms and conditions.

[¶] ... [¶]

FIRST CAUSE TO REVOKE PROBATION¹

(Abstain from Use of Any and All Mood Altering Substances)

13. At all times after the effective date of Respondent's probation, Condition 3 stated:

Respondent shall completely abstain from the possession or use of alcohol, controlled substances, dangerous drugs, and any and all other mood altering drugs, substances and their associated paraphernalia, except when the drugs are lawfully prescribed by a licensed practitioner as part of a documented medical treatment.

[¶] ... [¶]

Any positive result that registers over the established laboratory cutoff level shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against Respondent's respiratory care practitioner license.

[¶] ... [¶]

14. Respondent's probation is subject to revocation because he failed to comply with Probation Condition 3, referenced above. The facts and circumstances regarding this violation are as follows:

On March 9, 2006, Respondent appeared at a collection site to provide a urine specimen for testing and analysis in accordance with his probation monitoring program. The laboratory report from Compass Vision Inc. indicated he tested positive for Ethyl Glucuronide at 390 nanograms/milligrams.

¹ Case No. R-1960

On June 21, 2006, Respondent provided a urine specimen for testing and analysis. The laboratory report indicated he tested positive for Cannabinoids at 8.0 nanograms/milligrams.

On August 16, 2006, Respondent provided a urine specimen for testing and analysis. The laboratory report indicated he tested positive for Ethyl Glucoronide at 2700 nanograms/milligrams.

On September 19, 2006, Respondent provided a urine specimen for testing and analysis. The laboratory report indicated he tested positive for Cannabinoids at 12 nanograms/milligrams.

On November 20, 2006, Respondent provided a urine specimen for testing and analysis. The laboratory report indicated he tested positive for Cannabinoids at 21 nanograms/milligrams.

On December 27, 2006, Respondent provided a urine specimen for testing and analysis. The laboratory report indicated he tested positive for Cannabinoids at 11 nanograms/milligrams.

On January 11, 2007, Respondent provided a urine specimen for testing and analysis. The laboratory report indicated he tested positive for Cannabinoids at 39 nanograms/milligrams.

SECOND CAUSE TO REVOKE PROBATION

(Supervisor Quarterly Reports)

15. At all times after the effective date of Respondent's probation, Condition 5 stated:

Supervisor Quarterly Reports of Performance are due for each year of probation and the entire length of probation from each employer, as follows:

For the period covering January 1st through March 31st, reports are to be completed and submitted between April 1st and April 7th. For the period covering April 1st through June 30th, reports are to be completed and submitted between July 1st and July 7th. For the period covering July 1st through September 30th, reports are to be completed and submitted between October 1st and October 7th. For the period covering October 1st through December 31st, reports are to be completed and submitted between January 1st and January 7th. Respondent is ultimately responsible for ensuring his employer(s) submits complete and timely reports. Failure to ensure each employer submits complete and timely reports shall constitute a violation of probation.

16. Respondent's probation is subject to revocation because he failed to comply with Probation Condition 5 referenced above. The facts and circumstances regarding this violation are as follows:

Respondent failed to ensure that his employer submit a Supervisor Quarterly Report of performance for the period July 1 through September 30, 2006, which was due to the Board by October 7, 2006.

Respondent failed to ensure that his employer submit a Supervisor Quarterly Report of performance for the period October 1 through December 31, 2006, which was due to the Board by January 7, 2007.

THIRD CAUSE TO REVOKE PROBATION
(Obey All Laws)

17. At all times after the effective date of Respondent's probation, Condition 6 stated:

Respondent shall obey all laws, whether federal, state or local. Respondent shall also obey all regulations governing the practice of respiratory care in California.

Respondent shall notify the Board in writing within 14 days of any incident resulting in his arrest, or charges filed against, or a citation issued against Respondent.

18. Respondent's probation is subject to revocation because he failed to comply with Probation Condition 6, referenced above. The facts and circumstances regarding this violation are as follows:

Respondent violated section 3750.5, subdivision (b) of the Code in that he used the controlled substance Cannabinoids.² The facts and circumstances, set forth in Paragraph 14 of this Accusation and Petition to Revoke Probation, are incorporated herein by reference.

On or about December 12, 2005, in a criminal proceeding entitled *People v. Damien Mark Herrera*, in Orange County Superior Court, Case Number 05NM11669, Respondent was convicted by a plea of guilty to failure to stop at the scene of an accident in which his vehicle was involved, a violation of Vehicle Code section 20002(a), and driving a motor vehicle with privilege suspended for driving under the influence of alcohol, a violation of

² Cannabinoids are mind-altering (psychoactive) drugs; they all contain THC (delta-9-tetrahydrocannabinol), the main active chemical in marijuana.

Vehicle Code section 14601.2(a). He was placed on probation for three years with various terms and conditions.

FOURTH CAUSE TO REVOKE PROBATION
(Quarterly Reports)

19. At all times after the effective date of Respondent's probation, Condition 7 stated:

Respondent shall file quarterly reports of compliance under penalty of perjury, on forms to be provided to the probation monitor assigned by the Board. Omission or falsification in any manner of any information on these reports shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against Respondent's respiratory care practitioner license.

Quarterly report forms will be provided by the Board. Respondent is responsible for contacting the Board to obtain additional forms if needed. Quarterly reports are due for each year of probation and the entire length of probation as follows:

For the period covering January 1st through March 31st, reports are to be completed and submitted between April 1st and April 7th. For the period covering April 1st through June 30th, reports are to be completed and submitted between July 1st and July 7th. For the period covering July 1st through September 30th, reports are to be completed and submitted between October 1st and October 7th. For the period covering October 1st through December 31st, reports are to be completed and submitted between January 1st and January 7th.

Failure to submit complete and timely reports shall constitute a violation of probation.

20. Respondent's probation is subject to revocation because he failed to comply with Probation Condition 7 referenced above. The facts and circumstances regarding this violation are as follows:

Respondent failed to submit his Quarterly Report of Compliance for the period July 1 through September 30, 2006, which was due to the Board by October 7, 2006.

Respondent failed to submit his Quarterly Report of Compliance for the period October 1 through December 31, 2006, which was due to the Board by January 7, 2006.

FIRST CAUSE FOR DISCIPLINE
(Use of a Controlled Substance)

21. Respondent is subject to disciplinary action under section 3750.5, subdivision (b) of the Code, in that he used the controlled substance Cannabinoids. The facts and circumstances, set forth in Paragraph 14 of this Accusation and Petition to Revoke Probation, are substantially related to the qualifications, functions or duties of a respiratory care practitioner, and are incorporated herein by reference.

SECOND CAUSE FOR DISCIPLINE
(Commission of a Fraudulent, Dishonest, or Corrupt Act)

22. Respondent is subject to disciplinary action under section 3750, subdivision (j) of the Code in that he committed a fraudulent, dishonest or corrupt act substantially related to the qualifications, functions, or duties of a respiratory care practitioner.

On or about March 14, 2006, Respondent completed a Drug Questionnaire in which he answered "No" to question number 5, "In the last 3 months, have you consumed alcohol?" He signed the form under penalty of perjury that the information he reported was true and correct. Respondent failed to truthfully and correctly answer question number 5. The laboratory report from Compass Vision Inc. indicated that the urine specimen he provided on March 9, 2006, tested positive for Ethyl Glucuronide at 390 nanograms/milligrams.

Costs of Investigation and Enforcement

4. Although, in the Accusation and Petition to Revoke Probation, Complainant requested that Respondent pay the Board its costs of investigation and enforcement of this matter, Complainant did not submit any evidence of the costs of investigation and enforcement.

Respondent's Evidence

5. Respondent is unmarried and lives with his parents, providing assistance with their expenses. He has a one-year-old daughter, for whom he provides financial support. Respondent has custody of his daughter Tuesdays through Fridays every week. He has a positive relationship with his daughter's mother, and she is aware of the disciplinary charges pending against Respondent.

6. Respondent has been a licensed respiratory therapist for eight years. Over half the time he has been licensed, he has been on probation with the Board. Additionally,

throughout the entire time of his licensure, he has either had criminal charges pending against him or has been on probation in a criminal proceeding or with the Board.

7. Just prior to his licensure, Respondent sustained a conviction for driving under the influence of alcohol (DUI), which was the basis for his first three-year probation with the Board from 2000 through 2003, in Case No. R-1380. Respondent completed his probation with the Board and his criminal probation, which included a 90-day DUI program through the Department of Motor Vehicles (DMV).

8. In 2004, Respondent was again convicted of DUI, which was the basis for his current three-year probation, commencing July 18, 2005 (Case No. R-1960). As part of his criminal probation, Respondent completed an 18-month, DMV drug and alcohol rehabilitation program.

9. In 2005, Respondent sustained his third conviction, which is one of the bases for the current Accusation and Petition to Revoke Probation. That conviction arose from an incident where Respondent was driving his truck out of a parking space and hit a parked, unoccupied vehicle. He panicked because he did not have a valid driver's license at the time, and he did not want his truck to be seized. Respondent fled the scene of the collision and was contacted by police later that day. As a result of the 2005 conviction, Respondent served 20 days in county jail and was placed on three years summary probation. He is scheduled to remain on criminal probation until December 2008.

10. One of the conditions of his current criminal probation is that Respondent's truck must be equipped with an ignition interlocking device for the duration of the probation. In order to unlock the ignition to start the vehicle, Respondent must breathe into the device to ensure that he has ingested no alcohol prior to driving.

11. Respondent is aware of the conditions of his current probation with the Board and was able to enumerate several of them, including the requirements of obeying all laws, abstaining from the use of drugs and alcohol and the submission of quarterly reports. He has paid the required cost recovery in full and is current with payment of his probation fees. He admits that he failed to submit his quarterly reports, failed to timely fax reports to his employer for completion and failed five drug tests during his current probation.

12. Respondent's explanation for his failure to timely submit quarterly probation reports and his failure to ensure timely submission of his supervisor's quarterly reports was that he had developed "the wrong attitude about being on probation." He stated that he was "just fed up about being on probation," noting that he had been on probation for virtually the entire time of his licensure. He did not want to be on probation anymore and wished his life to be "normal." He described the probation as stressful, embarrassing and preventing him from "getting jobs."

13. Respondent admitted using marijuana during his current probation, but explained that he was a very infrequent user and that he did not realize his drug use would show up on the drug screening. He used marijuana three or four times a month when he was "really stressed out." He would sometimes have to work 12 hours and then go home and take care of his daughter all day. After she had left his home, he would use marijuana in order to relax.

14. Prior to his receipt of the Accusation and Petition to Revoke Probation in February of 2007, Respondent was not made aware of any of his positive drug tests. Respondent resumed his abstinence from alcohol and drugs after he received the Accusation and Petition to Revoke Probation in this case. He characterized the March 1, 2007 positive drug test as "residual."

15. Respondent voluntarily attended eight Alcoholics Anonymous (AA) meetings from the beginning of May 2007 until June 28, 2007.

16. Respondent voluntarily met with a Certified Addiction Counselor on July 6, 2007. He agreed to a treatment plan that would include attending 12-step meetings three to four times per week, finding a sponsor to work on the 12 steps and attending individual therapy every two weeks. Respondent does not currently have a sponsor because "it is not the easiest thing to get a sponsor." He last attended an AA meeting on June 28, 2007.

17. Respondent stated that the birth of his daughter changed his life and that he realized that he had a whole new responsibility to support her. He feels that "all of his life" is now for his daughter. He is trying to lead a different life and is willing to commit to any program to retain his license.

18. Respondent is currently employed through a registry service, Tri-Valley Respiratory Care, for which he has worked since November of 2003. His employer is not aware of the current case before the Board. Respondent noted that, when his employer finds out about the disciplinary hearing, he will not be happy.

19. On the day of the administrative hearing, Respondent submitted to the Board his Quarterly Report of Compliance for the period of "July 1 through September 30." Although the year was not specified on the quarterly report, it appears that the reporting period was 2006, since the report for the July 1 through September 30, 2006 reporting period was delinquent, and since the July 1 through September 30, 2007 reporting period had not yet expired.

20. Respondent also submitted a Quarterly Report, dated May 30, 2007, for the reporting period "April 1st through June 30th [no year specified]," and a Supervisor Quarterly Report, dated May 20, 2007, for the reporting period "January 1st through March 31st [no year specified]." These reports were not at issue as delinquent reports in the Petition to Revoke Probation. However, Respondent indicated that he was "just trying to get caught up on back reports."

21. Respondent acknowledged that another Supervisor Quarterly Report had been due in early July 2007, but that his supervisor should be sending it to the Board on the day of the administrative hearing.

22. On April 9, 2007, Respondent completed a four-hour MediTech Respiratory Training course.

23. Respondent's cousin, who was his prior employer from 1999 through 2002, testified credibly on Respondent's behalf. Respondent showed no signs of drug or alcohol abuse while he was working for his cousin. Additionally, Respondent's cousin noticed Respondent's "enthusiasm" after his daughter was born.

LEGAL CONCLUSIONS

1. Cause exists to revoke Respondent's probation and to impose the stayed revocation of Respondent's respiratory care practitioner's license for failure to comply with Condition 3 of his probation, by failing to abstain from the use of alcohol, controlled substances or dangerous drugs as evidenced by his positive drug tests, as set forth in Factual Findings 2, 3, 11 and 13.

2. Cause exists to revoke Respondent's probation and to impose the stayed revocation of Respondent's respiratory care practitioner's license for failure to comply with Condition 5 of his probation, by failing to ensure the timely filing of Supervisor Quarterly Reports of Performance, as set forth in Factual Findings 2, 3, 11 and 12.

3. Cause exists to revoke Respondent's probation and to impose the stayed revocation of Respondent's respiratory care practitioner's license for failure to comply with Condition 6 of his probation, by failing to obey all laws as evidenced by his use of controlled substances in violation of Business and Professions Code section 3750.5, and by his 2005 conviction, as set forth in Factual Findings 2, 3, 11, 9 and 13.

4. Cause exists to revoke Respondent's probation and to impose the stayed revocation of Respondent's respiratory care practitioner's license for failure to comply with Condition 5 of his probation, by failing to timely file Quarterly Reports of Compliance, as set forth in Factual Findings 2, 3, 11 and 12.

5. Cause exists for the suspension or revocation of Respondent's respiratory care practitioner's license for violation of Business and Professions Code section 3750.5, subdivision (b), as set forth in Factual Findings 2, 3, 11 and 13.

6. Cause exists for the suspension or revocation of Respondent's respiratory care practitioner's license for commission of a dishonest act substantially related to the qualifications, functions and duties of a respiratory care practitioner, pursuant to Business and Professions Code section 3750, subdivision (j), as set forth in Factual Findings 2 and 3.

7(a). Respondent is "fed up" with being on probation, and understandably so. He has been on probation almost continuously for about eight years, virtually his entire time of licensure. The evidence did not establish that extending Respondent's probation another several years would make him less weary of being on probation. Likely the same or greater "fed up" reaction would occur should Respondent be faced with the prospect of being on continual probation for over a decade.

7(b). Additionally, Respondent's assurance that the birth of his daughter was the turning point in his life, prompting probationary compliance, is not convincing. While the birth of his child may have been a life-changing event in terms of emotional and financial investment, Respondent's assertion that her birth ignited his renewed compliance is belied by the facts that: (1) Respondent continued to use marijuana for stress relief after the birth of his daughter (Factual Finding 13), and stopped his drug use only when served with the Accusation and Petition to Revoke Probation, many months after her birth (Factual Finding 14); and (2) Respondent continued his delinquent submission of required quarterly reports after his daughter's birth (Factual Finding 3, 19 and 20).

7(c). Furthermore, Respondent has made only minimal efforts at rehabilitation and these half-hearted efforts were only recently undertaken. Respondent started attending AA meetings in May 2007 and discontinued them at the end of June 2007, after attending only eight meetings. He did not meet with an addiction counselor until the week prior to the administrative hearing, and apparently made no efforts to further his treatment plan since that meeting. Moreover, the flurry of quarterly reports submitted prior to and during the hearing, in order to "get caught up on back reports," demonstrates damage repair, rather than rehabilitation.

7(d). While at this point, Respondent's personal troubles have apparently not seeped over into his professional life, after eight years of probation and continued violations, it would not be reasonable to require the public to gamble on this not occurring. The evidence did not establish that an extension of probation would help Respondent move toward complete rehabilitation, which should be achieved prior to asking again for the public's trust. Given the foregoing, the order that follows is necessary for the protection of the public health, safety and welfare.

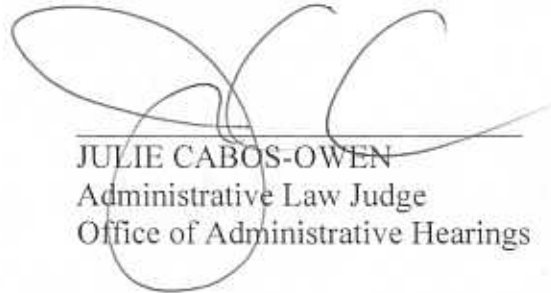
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ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Respiratory Care Practitioner License Number 20799, issued to Damien Mark Herrera is hereby revoked.

DATED: July 25, 2007



JULIE CABOS-OWEN
Administrative Law Judge
Office of Administrative Hearings